APPEAL NO. 032032
FILED SEPTEMBER 19, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on June 24, 2003. The hearing officer determined that the respondent (claimant) was entitled to supplemental income benefits (SIBs) for the first quarter.

The appellant (carrier) appeals, contending that the claimant was enrolled full time in a college but not under the auspices of the Texas Rehabilitation Commission (TRC), that the claimant had some ability to work as evidenced in a functional capacity evaluation (FCE), that the claimant failed to present a narrative that specifically explained how the claimant's compensable injury causes a total inability to work, and that there is another record which shows an ability to work in a sedentary position. The file does not contain a response from the claimant.

DECISION

Reversed and a new decision rendered.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The parties stipulated that the claimant sustained a compensable (low back) injury on _____, that the claimant had an impairment rating of 15% or greater, that the qualifying period for the first quarter was from January 11 through April 11, 2003, and that the claimant's unemployment was a direct result of her impairment (*see* the requirement in Section 408.142(a)(2) and Rule 130.102(b)(1)). At issue is the requirement of a good faith effort to obtain employment commensurate with the employee's ability to work pursuant to Section 408.142(a)(4) and Rule 130.102(b)(2).

It is undisputed that the claimant enrolled for 13 credit hours (four courses) of college in January 2003, that she successfully completed those credits, and that her enrollment was not part of a program sponsored by the TRC (*see* Rule 130.102(d)(2)). The claimant testified that she drove to classes, 25 to 35 minutes each way and carried her books in a backpack on wheels. The claimant testified that she attended classes from 8:00 a.m. to 10:00 a.m., then had a three-hour break to rest and had a class at 1:00 p.m.

The carrier's appeal and argument at the CCH, cites Texas Workers' Compensation Commission Appeal No. 000121, decided March 3, 2000, for the proposition that a claimant "was not entitled to SIBs, where the claimant was enrolled full time in a college and his [in Appeal 000121] study was not undertaken through or paid for through TRC" under Rule 130.102(d)(2). We do not disagree with that proposition but point out that Appeal No. 000121 went on to state that the hearing

officer could still consider "whether the claimant made a good faith effort under Rule 130.102(d)(4)." That is what happened in this case.

Rule 130.102(d)(4) provides that an injured employee has made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work. The hearing officer found that the claimant had no ability to work and that Dr. Y medical reports "of 1/8/03 and 3/28/03 suffice as medical narratives detailing claimant's inability to work. . . under Rule 130.102(d)(4)." The report dated January 8, 2003, is basically a clinic status report which concludes that the claimant "has not yet been cleared for employment." The report of March 28, 2003, states that the claimant "is still disabled," notes failed back surgery, use of "high-dose, long-acting narcotics," and concludes:

> The reason she cannot work is because of her lumbar fusion and that she has absolutely zero ability to bend, stoop, crawl, or climb steps or stairs, lift, push or pull. She cannot operate a motor vehicle or motorized equipment.

At least a portion of that report contains an incorrect assumption that the claimant cannot operate a motor vehicle which is expressly contradicted by the claimant's testimony that she drove 25 to 35 minutes to school. Further, that report does not explain why the claimant cannot do a job that does not involve bending, stooping, crawling, climbing steps, lifting, pushing, or pulling, such as a receptionist or other sedentary part-time position. The claimant was obviously able to attend classes full time and there is no indication why she could not do a part-time, three hours a day job. In Texas Workers' Compensation Commission Appeal No. 961476, decided September 11, 1996, and cited in Texas Workers' Compensation Commission Appeal No. 990635, decided May 11, 1999, the Appeals Panel (Judge Kilgore dissenting), in reversing a hearing officer's decision that the claimant in that case was unable to work and was entitled to SIBs, noted that the doctors had failed to explain how the claimant in that case could pursue a full-time course of college classes during the filing period and yet have no ability to do any work of any type, not even part-time sedentary work. The hearing officer's determination that Dr. Y's reports of January 3 and March 28, 2003, provide the specific narrative required by Rule 130.102(d)(4) is not supported by the evidence.

The hearing officer also determined that Dr. B's report of May 28, 2003, was not a credible record which established the claimant's ability to work because "it was based on an incomplete history omitting that the claimant did return to physical therapy as soon as the semester ended." In her discussion, the hearing officer comments that Dr. B "changed his opinion based on an incorrect assumption about her [the claimant's] withdrawal from physical therapy." Actually, Dr. B's report references his previous examinations of the claimant (not in evidence), and recites the claimant's present

complaints, and his examination results. In a separate section under "Comments and Conclusions," Dr. B has a subsection entitled "Work abilities" which states:

> My first inclination was to indicate that she was not a candidate for work at this time. But, I have been given additional information regarding her ability to attend classes for 13 hours this semester and an FCE which indicates she is able to perform at a sedentary level. With this said, I think it is a good idea for her to attend classes but I believe, based on this information that she now qualifies and could handle a sedentary position.

It is in a separate subsection entitled "Future treatment" that Dr. B comments that the claimant is not attending physical therapy due to her class schedule and encourages the claimant to continue her rehabilitation program. Fairly clearly Dr. B bases his opinion that the claimant has some ability to work on an FCE (which is somewhat ambivalent) and the claimant's ability to attend classes 13 hours for the semester. The hearing officer's determination that Dr. B's report was not a credible record showing the claimant is able to return to (some kind) of work is against the great weight and preponderance of the evidence.

Accordingly, the hearing officer's decision that the claimant is entitled to SIBs for the first quarter is reversed and a new decision is rendered that the claimant is not entitled to SIBs for the first quarter.

The true corporate name of the insurance carrier is **HARTFORD UNDERWRITERS INSURANCE** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Thomas A. Knapp
Appeals Judge

CONCUR:

_____
Elaine M. Chaney
Appeals Judge

DISSENTING OPINION:

The questions of whether or not a narrative shows an inability to work or whether another record shows an ability to work are questions of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 000302, decided March 27, 2000. In this case, I would defer to the hearing officer as the finder of fact in regard to these matters. I do not think the great weight and preponderance of the evidence is contrary to the findings of the hearing officer. Nor do I find that the hearing officer has incorrectly applied the law. Thus, I would affirm the decision and order of the hearing officer.

_____

Gary L. Kilgore
Appeals Judge